STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

VALERIA HALIW and ILKO HALIW,
Plaintiffs-Appellants

Supreme Court Docket No. 125022

-vs-

CITY OF STERLING HEIGHTS,
Defendant-Appellee
_____/

PLAINTIFFS-APPELLANTS'

REPLY BRIEF

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ARGUMENT

A. APPELLEE IS CORRECT THAT PRIOR TO THE RULING BELOW IN THE MICHIGAN COURT OF APPEALS, POST-JUDGMENT APPELLATE ATTORNEYS FEES WERE NOT RECOVERABLE AS CASE EVALUATION SANCTIONS

The parties (*hereinafter* "Appellants" and "Appellee") are in agreement that prior to the Michigan Court of Appeals' ruling in *Haliw v. Sterling Heights*[1] it was unquestionably the law in the State of Michigan that appellate attorney fees were not recoverable as case evaluation sanctions under Michigan Court Rule ("MCR") 2.403. As stated by Appellee:

> Thus, American Casualty and Giannetti established the rule that post-judgment appellate attorney fees and costs are not recoverable as case evaluation sanctions because appellate attorney's fees are solely controlled under MCR 7.216 (C) and not under MCR 2.403.[2]

We agree with the Appellee that prior to the *Haliw* Court's interpretation of MCR 2.403, appellate attorney fees were not recoverable as case evaluation sanctions and that the *Haliw* Court reversed the established Court of Appeals' precedent interpreting MCR 2.403.

Appellee then credits the *Haliw* Court with rejecting some of the reasoning of *American Casualty* and *Giannetti* by holding that "MCR 7.216 (C) and MCR 2.403 (O) serve different purposes. While MCR 2.403 is designed to encourage settlement and deter protracted litigation . . . MCR 7.216 (C) deters clear abuse of the appellate process."[3] This basis for the *Haliw* Court's

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1 Mich App No. 237269 (2003) (*hereinafter* "*Hali*w Court").

2 Response Brief of Appellee, p. 15. The two cases to which the Appellee cites are *American Casualty Co. v Costello*,174 Mich App 1; 435 N.W.2d 760 (1989) and *Gianetti Bros Construction Co. v Pontiac*, 175 Mich App 442; 438 N.W.2d 313 (1989).

3 Response Brief of Appellee, p. 15, *quoting* Haliw, Mich App. No. 237269 (emphasis of Appellee is omitted).

rejection of *American Casualty* and *Giannetti*, however, was specifically rejected by the Michigan Supreme Court in *McAuley v General Motors Corp*,[4] and then specifically overruled in *Rafferty v. Markovitz*.[5] The holding is clear: An independent purpose rationale, as a basis for awarding attorney fees when another Court Rule or statute provides for the same, cannot be a basis for awarding attorney fees under MCR 2.403: "[W]e repudiate the dicta in *McAuley* that left open the possibility of recovering attorney fees under both a court rule and a statute where each attorney-fee provision serves an independent purpose."[6] That there are different policy reasons serving MCR 2.403 and MCR 7.216 cannot serve as a basis, as the *Haliw* Court reasoned, for awarding appellate attorneys fees under MCR 2.403, when MCR 7.216 unquestionably already provides for appellate attorney fees. The *McAuley* Court also held, which Appellee focuses on, that double recoveries are not permitted (which is intuitive). McAuley further held, however, that independent purpose rationales cannot be the basis for awarding attorney fees when another statute or rule expressly provides. The Haliw Court based its holding on independent purposes of MCR 2.403 and MCR 7.216. This was not permissive and therefore the ruling below should be reversed.

Appellee also argues that since it will not be able to recover **all** of its attorney fees because it allegedly cannot avail itself to the explicit appellate attorney fees provided by MCR 7.216 (C), that this

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4 457 Mich. 513; 578 N.W.2d 282 (1998).

5 461 Mich. 265; 602 N.W.2d 367 (1999).

6 *Rafferty*, 461 Mich. at 272-73 & n. 6 (*adopting* McAuley, 457 Mich. 526-29 (Taylor J. concurring in part and dissenting in part).

somehow means that appellate attorney fees must be implied from MCR 2.403.[7] *Non sequitur*, of course. Appellee's argument assumes, *a fortiori*, that there *is* some right to have **all** of one's attorneys fees paid as a result of a case evaluation rejection. As was explored in the Brief of Appellants on file with this Court, and is explored *supra* and *infra*, this assumption is untenable based on *stare decisis* and the plain language of MCR 2.403.

Appellee also spends a good portion of its Brief arguing that the plain meaning of MCR 2.403 means that appellate attorney fees must be recoverable as case evaluation sanctions because Black's Law Dictionary maintains no apparent distinction between trial attorney fees and appellate attorney fees. In this way, Appellee maintains that existing caselaw and *stare decisis*, which have interpreted words a certain way for years (which Appellee concedes), are subordinate to the definition in a good dictionary. In promulgating the Court Rules, Appellants respectfully maintain that the Supreme Court was much more conscious of existing case law and the line of reasoning as expounded upon in *American Casualty* than that of Black's Law Dictionary. The Michigan Supreme Court, Appellants contend, do not draft Rules in such an airtight vacuum as the Appellee argues. Clear *stare decisis*, based on the decades old "American Rule," that attorney fees are not recoverable unless explicitly provided for, provides a much clearer backdrop for Rule interpretation than Black's Law Dictionary.

B. APPELLEE'S RELIANCE ON *KEISER V. ALLSTATE INSURANCE CO.* AND *HYDE V. UNIVERSITY OF MICHIGAN* REGENTS IS MISPLACED

Appellee relies heavily on *Keiser v. Allstate Insurance Co.*[8] as a basis for one receiving

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7 Response Brief of Appellee, p. 20.

8 195 Mich App 369; 491 N.W.2d 581 (1992).

appellate attorney fees as a result of a rejection of case evaluation. *Keiser* held that "Verdict", as used in MCR 2.403 (O), means that the "ultimate verdict after appellate review" is the "verdict" to be compared against the case evaluation value. From this, Appellee credits *Keiser* as holding that any decision rendered on appeal after an order or ruling of the trial court, with attorney fees associated therewith, are to be included as mediation sanctions. Appellee severely distorts *Keiser*.

First, as a matter of *stare decisis*, any reliance on *Keiser* by Appellee for the above proposition is *dicta* at best:

> The *only issue on appeal* is whether, after a party rejects a mediation evaluation and, ***following a trial***, a verdict more favorable to the rejecting party is returned, MCR 2.403(O) allows the imposition of sanctions on the rejecting party following appellate reversal of the verdict where the final result is no longer favorable to that party.[9]

On its face, *Keiser's* holding is only on point to the extent there was a trial. There was no trial here. After case evaluation, the Appellee herein moved for Summary Disposition, which was eventually granted by this Court. No trial was held. *Keiser* is inapposite.[10]

Further, *Keiser* specifically held that judgments made pursuant to rulings on pretrial motions are not subject to the mediation rule. *Keiser* affirmatively quoted a prior holding of the Court of Appeals, which stated: "We refuse plaintiff's invitation to extend the Wayne Circuit mediation rule as it then existed to judgments entered *pursuant to motions prior to trial or posttrial appeals*."[11] The *Keiser*

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9 *Keiser*, 195 Mich. App. at 371 (emphasis added).

10 So the same with *Hyde v. University of Michigan Regents*, 226 Mich. App. 511; 575 N.W.2d 36 (1997). That case proceeded to a jury trial and was concluded with a finding in favor of the plaintiff. *Id.* at 518. It is no surprise, therefore, that that case looked to *Keiser* for guidance, as Appellee notes. However, it simply is off point.

11 *Keiser*, 195 Mich App. at 373 (emphasis added) (*quoting* Clute v General Accident Assurance Co of Canada, 177 Mich App 411; 442 NW2d 689 (1989).

Court then held: "The procedural history of *Clute* is somewhat similar to that of the present case. However, while the panel's position regarding **pretrial motions** was amply supported by existing case law, *Silverstein*, *supra*; *Mehelas*, *supra*, its statement regarding judgments entered pursuant to **posttrial appeals was not**."[12] *Keiser* then went on to **affirm** the holding of *American Casualty* as it related to *pretrial motions*. Of course, this issue here relates to Appellee's *pretrial motion* for Summary Disposition. *Keiser*, therefore, supports the argument of the Appellants, not Appellee.

Lastly, Appellee argues that the following statement from *Keiser* compels Appellants to pay Appellee's appellate attorney fees:

> We conclude that it is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O).

Another *non sequitur*. This statement merely avoids the situation, as in *Keiser* and in this case, where the plaintiff won a motion at the trial level, but lost on appeal. Plaintiff in *Keiser* attempted to persuade the appellate court that since the *trial court* had ruled in its favor, that *that* verdict should be the appropriate verdict against which MCR 2.403 case evaluation sanctions should be viewed. The *Keiser* Court rightly disagreed and held it was the ultimate verdict that is used to determine whether the verdict was more favorable to the rejecting party. Appellants herein have *never maintained* that since the Trial Court originally ruled in their favor, the Trial Court's "verdict" is the controlling verdict to which MCR

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12 *Keiser*, 195 Mich. App. at 373 (emphasis added). *Keiser's* internal citations were to *Silverstein v Services, Inc*, 165 Mich App 355; 418 NW2d 461 (1987) and *Mehelas v Wayne Co Community College*, 176 Mich App 809; 440 NW2d 117 (1989).

2.403 looks. Of course, it is this Court's ruling on appeal of Appellee's Motion for Summary Disposition that was the ultimate verdict. We agree that *that* result is measured against Appellants' rejection of case evaluation. That was the argument to which the *Keiser* Court responded — and nothing more. To argue that *Keiser* implicitly condoned awarding appellate attorney fees as a case evaluation sanction is simply attributing a meaning to that Court which was never expressed or even implied.

C. PERMITTING APPELLATE LITIGATION TO OCCUR IN CIVIL CASES IS NOT VALUELESS, AS APPELLEE MAINTAINS

Appellee credits this Court with drafting a Court Rule with the intention that there should be less litigation in the appellate division — at all costs. Appellee states that "the purpose of MCR 2.403 is not to promote appellate litigation but encourage settlement and deter protracted litigation by placing the burden of litigation on that party that required the case to proceed."[13] Of course, Appellants have never maintained that MCR 2.403 was drafted to encourage appellate litigation. As the case Appellee cited for the above-quoted interpretation held: "The overall purpose of the mediation rule is to encourage settlement and deter protracted litigation. The purpose behind the mediation sanction rule is to place the burden of litigation costs upon **the party which requires a trial** by rejecting a proposed mediation award."[14]

Appellants have always maintained that MCR 2.403 has a much needed place in our justice system, which places the burden of *trial* attorney fees on "the party which requires a *trial*." Appellants

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13 Response Brief of Appellee, p. 18.

14 *Michigan Basic Property Ins. Ass'n v. Hackert Furniture Dis...*, 194 Mich. App. 230, 235; 486 N.W.2d 68 (1992) (emphasis added).

and Appellee, however, sharply disagree with regard to the value of appellate review. Appellants argue it has an indispensable value (*see, e.g.*, Brown v. Board of Education, 347 U.S. 483, 495 (1954); Loving v. Virginia, 388 U.S. 1, 10-12 (1967)). Appellee does not. Appellee has taken the position that MCR 2.403 is a clear indication by this Court that appellate litigation should be avoided to a maximum extent, an ironic position taken in this Court. It is even more ironic when one considers that the Appellee acquired a huge benefit when this Court corrected the errors of the Trial Court and the Court of Appeals — errors that would still be ruminating in the lower courts had this case been denied appellate review because of a prohibitive interpretations of MCR 2.403 like that of the *Haliw* Court.

MCR 2.403 has its rightful place in placing burdens on parties as to whether they will choose to pursue a trial and risk paying the other party's trial attorney fees or settle for the case evaluation award. However, MCR 2.403 must be placed in its *context*. The context is, of course, a democracy which values appellate review, needs it, and requires it. Appellants maintain that the value of appellate review we place in our judicial system and democracy is not so subordinate to "the overall purpose of and intent of MCR 2.403 (O) (6)"[15] that this Court would draft a Rule to inhibit appellate jurisdiction in the way the *Haliw* Court has.

D. CONTRARY TO APPELLEE'S READING OF MICHIGAN CASELAW, THE PLAIN LANGUAGE OF MCR 2.403 (O) CUTS IN APPELLANTS' FAVOR, NOT APPELLEE'S

Appellee attempts to recast a hundred years of common law firmly establishing the "American Rule" in our jurisprudence,[16] that appellate attorney fees are not recoverable unless **expressly** provided

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15 Response Brief of Appellee, p. 19.

16 *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970).

for by Court Rule or statute, into a rule where appellate attorney fees are presumed and inferred. Indeed, Appellee concedes that "American Casualty and Giannetti established the rule that post-judgment appellate attorney fees and costs are not recoverable as case evaluation sanctions" and that it was not until the *Haliw* Court overruled these precedents that appellate attorney fees were awarded as case evaluation sanctions.

Appellee attempts to shift the burden of providing an exception to the American Rule to Appellants by arguing that since the Court Rules did not say "only trial court attorney's fees,"[17] appellate fees are presumed. In Michigan, however, this burden is on the Appellee.[18] Even the *Haliw* Court conceded this: "We begin by noting that as a general rule, attorneys' fees are not recoverable either as an element of costs or damages unless allowance of a fee is **expressly authorized** by statute or court rule."[19] On its face, therefore, MCR 2.403 does not provide for appellate attorneys fees. With the backdrop of the parties' agreement that *American Casualty* established the rule that appellate attorney fees are not awardable as case evaluation sanctions, this is even stronger evidence that the American Rule was not altered with regard to appellate attorney fees. Lastly, given that Chapter 7 of the Court Rules already provide for appellate attorney fees (and it does so expressly), the implication is clear: the American Rule was not altered by the 1997 changes to the Court Rules.

CONCLUSION AND RELIEF REQUESTED

Appellee has conceded that *American Casualty* and its progeny established the law in this

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17 Response Brief of Appellee, p. 21. *See also id.* at 7.

18 *Rafferty,* 461 Mich. at 270 (*relying on* McAuley, 457 Mich. 513).

19 *Haliw,* Mich App No. 237269, p. 4 (emphasis added).

State that appellate attorney fees could not be awarded as a case evaluation sanction under MCR 2.403 and that the Court of Appeals in *Haliw* overruled this interpretation. The *Haliw* Court and Appellee relied on law that was overruled by this Court, a misinterpretation of *Keiser*, and unfounded judicial activism in finding an exception to the American Rule.

The decision of the Court of Appeals should be reversed. Appellants request that this Court hold that appellate attorney fees are not recoverable under MCR 2.403 (O). Plaintiff further requests that this Court hold that only fees incurred at the trial level that were necessitated by rejection of case evaluation is an appropriate sanction.

Respectfully Submitted,

HALIW, SICILIANO, MYCHALOWYCH,
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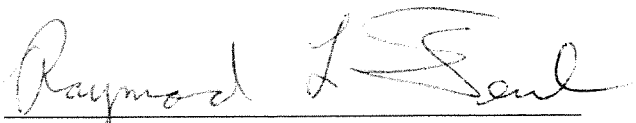
By: 

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